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ASSOCIATION OF AMERICAN RAILROADS

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May 12, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 702, National Trails System Act and Railroad Rights-of-Way

Dear Ms. Brown:

Pursuant to the Board's Notice served February 16, 2011, attached please find the Reply Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 702

NATIONAL TRAILS SYSTEM ACT AND RAILROAD RIGHTS-OF-WAY

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In a Notice of Proposed Rulemaking ("NPR") served February 16, 2011, the Surface Transportation Board ("Board") instituted a proceeding to clarify and update some of its existing regulations and procedures regarding the use of railroad rights-of-way ("ROW") for railbanking and interim trail use under Section 8 (d) of the National Trail Systems Act ("Trails Act"), 16 U.S.C. § 1247 (d). NPR at 1. The Board also proposed to add new rules to its existing regulations that would impose certain additional procedural requirements on railroads and trail sponsors regarding interim trail use agreements. *Id.* The Board requested comment on its proposed rules as well as on "how to resolve state sovereign immunity issues" pertaining to "the ability of some states to assume liability and legal and financial responsibility for a right-of-way during the interim trail use period." *Id.* at 1, 6.

The Association of American Railroads ("AAR") filed opening comments on April 12, 2011. The AAR generally concurred in the Board's proposals except for certain proposed modifications. Specifically, the AAR noted that, because CITU/NITUs are self-executing and authorize a carrier to abandon any portion of the right-of-way not covered by an interim trail use

agreement, it would be unnecessary and procedurally burdensome for the Board to require (as proposed in the NPR) the vacation and modification of original CITU/NITUs where an interim trail use agreement is negotiated for only a portion of the right-of-way proposed for abandonment. AAR April 12, 2011 Comments at 15-17.

With respect to the sovereign immunity issue, the AAR concurred in the Board's view that the "plain language" of 16 U.S.C. § 1247(d) required a trail sponsor to "assume responsibility for ...any legal liability arising out of such transfer or use [of a railroad right-of-way proposed for abandonment for interim trail use]" and that any change in the Board's rules that would permit a state entity with sovereign immunity to qualify its statement of willingness to assume full legal and financial responsibility (or to indemnify the railroad) as part of a request for interim trail use would fail to meet the applicable statutory requirements. AAR April 12, 2011 Comments at 9.[1]

Opening comments were also filed in this proceeding by Madison County Transit ("MCT"), the Maryland Transit Administration ("MTA") and the Rails-to-Trails Conservancy ("RTC"). Those parties commented on several aspects of the Board's proposed rules. The main focus of their comments, however, was on the state sovereign immunity issue. The parties urged the Board to accept a qualified statement of willingness to assume legal responsibility for interim trail use from a state or other government entity that had sovereign immunity as consistent with the Trails Act.

In its reply comments, the AAR reiterates its position on the sovereign immunity issue and responds to various contentions in the comments submitted by the other parties.

[1] The AAR also noted that in its recent decision in Finance Docket No. 32609, *Chesapeake Railroad Company—Certificate of Interim Trail Use and Termination of Modified Rail Certificate* (served February 24, 2011) ("*Chesapeake Railroad*") the Board confirmed such straight-forward construction of the law.

Discussion

The AAR offers the following reply comments in response to the submissions of MCT, MTA and RTC regarding issues that the AAR believes warrant further discussion.

1. State Sovereign Immunity Issues

Of most concern to MCT, MTA and RTC is the state sovereign immunity issue. Those parties contend that, although the Trails Act expressly requires that states and political subdivisions "assume full responsibility for management of such rights of way and for any legal liability arising out of such transfer or use, and for payment of any and all taxes that may be levied against such rights-of-way [16 U.S.C § 1247(d)]" and that the Board's longstanding rules permit an entity with legal immunity to satisfy this "assume full responsibility" requirement by agreeing to indemnify the railroad against any potential liability [*id.*], the Trails Act should nevertheless be construed by the Board to permit a state entity with sovereign immunity that proposes to serve as an interim trail sponsor to qualify its statement of willingness to indemnify the railroad based on state law. MCT Comments at 9-14; MTA Comments at 4-9; RTC Comments at 2-3. The AAR submits that such arguments should be rejected by the Board as inconsistent with the statutory requirements of the Trails Act.

In its opening comments, the AAR concurred in the Board's view that the "plain language" of 49 U.S.C. § 1247 (d) governs the issue and noted that it is "opposed to any change in the Board's rules that would permit a state entity to qualify its statement of willingness to indemnify the railroad as part of a request for interim trail use." AAR Opening Comments at 9. The AAR noted that its position was supported by the statutory language and precedent:

> As noted in the NPR, the provisions of 16 U.S.C. § 1247 (d) expressly require that a trail sponsor "assume responsibility for . . . any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied against such rights-of-way." Full assumption of liability by the trail sponsor is

> thus expressly required by the underlying statute. Although the Board may have the authority to determine (in adoption of 49 C.F.R. § 1152.29 (a) (2)) that an indemnification requirement (applicable to a trail sponsor that is otherwise immune from liability) is the equivalent to an assumption of liability and thus meets this requirement, it has no authority to qualify or reduce the full level of assumption of liability that the statute requires. Indeed, in its recent decision in Finance Docket No. 32609, *Chesapeake Railroad Company—Certificate of Interim Trail Use and Termination of Modified Rail Certificate* (served February 24, 2011) ("*Chesapeake Railroad*") the Board confirmed such straight-forward construction of the law. The Board expressly found that a qualified statement of willingness to assume financial responsibility filed by a state entity as part of its request for interim trail use "failed to meet the applicable statutory and regulatory requirements." Slip Opinion at 1.

Id. at 9-10.

MCT, MTA and RTC take issue with the Board's (and the AAR's) construction of the statutory language of 49 U.S.C. § 1247 (d) (and the *Chesapeake Railroad* decision) based on various alternative arguments. None of these alternative arguments has merit.

MTC contends that the Trails Act does not use the words "indemnify" or "hold harmless" anywhere and "[t]hus on its face does not require that a state or local government or a private organization indemnify a railroad, or hold it harmless, for anything." MCT Comments at 9. MCT's argument conflicts with both the language and legislative history of the Trails Act and is unsustainable.

As noted by the ICC in its rulemaking decision implementing the provisions of the Trails Act, *Rail Abandonments—Use of Rights-of-Way As Trails (49 CFR Parts 1105 and 1152)*, 2 I.C.C. 2d 591, 1986 WL 68617 (April 16, 1986) ("*Use of Rights-of-Way As Trails*"), not only does the statutory language of the Trails Act expressly require a prospective trail sponsor, including a state or political subdivision, to assume "full responsibility" for management, legal liability and taxes pertaining to the use of the ROW as an interim trail, the legislative history of the Trails Act confirms the express statutory language used. As stated by Congress:

> If interim use of an established railroad right-of-way consistent with the National Trails System Act is feasible, and if a State, political subdivision, or qualified private organization is prepared *to assume full responsibility* for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way—*that is, to save and hold the railroad harmless from all of these duties and responsibilities*—then the route will not be ordered abandoned.

H. Rept. 98-28, 98th Cong. 1st Sess., 8-9, reprinted in [1983] U.S. CODE CONG. & AD. NEWS 112, 119-20 (emphasis added); *Use of Rights-of-Way As Trails*, 1986 WL 68617 **12 and FN 8.

MCT also contends that "[i]n probably 99 % of instances of railbanking, the railbanking agreement involves the sale by the railroad of all of its interests to the interim trail manager" and that "[t]he interim trail manager, as the new owner, by accepting the deed automatically [by operation of the common law] assumes full responsibility for taxes, legal liability, and management." MCT Comments at 9. MCT thus contends that state government entities with sovereign immunity would "hold harmless" the railroad simply by assuming ownership. "In other words, entities with immunity satisfy the hold harmless notion simply by accepting title... thus fully satisfying the language and intent of 16 U.S.C. 1247 (d)." MCT Comments at 11.

MCT concedes however, that where there is some form of "joint venture" created, "as might be the case if less than the [railroad's] entire property interest is deeded (as, for example, perhaps in some forms of leases or licenses)... some special language may be necessary to ensure that the state or local government, or private organization, is assuming full responsibility, as that may not be controlled by common law." MCT Comments at 10.

The AAR does not dispute MCT's "hold harmless by accepting title" argument as it may apply to ROW *actually owned* by the carrier in fee under circumstances where the full actual ownership of the ROW would be transferred by the carrier to the state or local entity by deed or donation. The Trails Act, however, was generally intended to address situations where the ROW

is *not* owned by the carrier but is instead held by the carrier under an easement or reversionary interest (and would otherwise revert to the reversionary owner through abandonment if the provisions of the Trails Act were not invoked). See *Use of Rights-of-Way As Trails*, 1986 WL 68617 **6.

The AAR accordingly disagrees with MCT's blanket, unqualified assertion that "in probably 99 % of instances of railbanking, the railbanking agreement involves the sale by the railroad of all of its interests to the interim trail manager" and that "entities with immunity satisfy the hold harmless notion simply by accepting title." The AAR notes that in many (or most) Trails Act cases the carrier may not be the actual owner of the ROW but only the holder of a railroad easement which the carrier is permitting the trail sponsor to use as a trail on an interim basis and with respect to which the carrier retains a right to reactivate rail service over the ROW pursuant to the existing railroad easement if it so chooses. (Under the Trails Act, the carrier retains an absolute right to reactivate rail service over the ROW used as an interim trail.)[2] Under such circumstances transfer of the line to an interim trail sponsor by sale or donation would not transfer legal title to the ROW to the interim trail sponsor and it is arguable whether the common law liability rule cited by MCT would be applicable. Indeed, such circumstances could arguably constitute a "joint venture"-type arrangement that MCT expressly recognizes as an exception to its "automatically hold harmless by transfer of title" contention under the common law. [3] Accordingly, contrary to MCT's contention, there is still a need for a carrier to protect itself from

[2] As noted by the ICC, "[s]ince the [Trails Act] provides that interim trail use under section 1247(d) shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and reversionary interests do not mature." *Use of Rights-of-Way As Trails*, 1986 WL 68617 **6; see also *Birt v. STB*, 90 F. 3d 580, 583 (D.C. Cir. 1996) ("*Birt*").

[3] The AAR also notes that in many cases where the railroad transfers a ROW for interim trail use under the Trails Act, title to the ROW may be unclear and the carrier may actually only hold an easement to the property. See, e.g., Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY* (June 10, 2005) ("*Chelsea*"). In such cases, the carrier cannot be sure that it is able to transfer actual ownership of the property to the interim trail manager.

potential legal liability and taxes under the "statement of willingness" requirement even if the transfer of the railroad's interest is by sale or donation to cover those situations in which actual ownership of the property is itself not transferred.

The AAR would add, moreover, that if the state entity believes that it is indeed assuming all responsibility for legal liability, taxes and management of the ROW through acquisition of the ROW by sale (or donation) as MCT asserts, there is in fact no reason for a trail sponsor that is a state or local government entity *not* to offer an unqualified statement of willingness to assume full responsibility for the ROW.[4] See *Chesapeake Railroad*, Slip op. at 8.

MCT also contends that there are currently many instances where state or local government entities with sovereign immunity have been permitted by the ICC or the Board to serve as interim trail sponsors under the Trails Act and that the Board has no basis thirty years after the Trails Act's adoption "to purport to disenfranchise many and maybe most state and even local agencies from use of the railbanking statute on the ground that they have sovereign immunity when this sovereign immunity does not shift liability for trail use back to the rail industry." MCT Comments at 12.

AAR submits that, as both the ICC and Board have noted, the Board's role is administering the Trails Act is essentially ministerial. The agency does not look beyond a trail sponsor's submission of the required statement of willingness nor judge whether the trail sponsor is financially or otherwise capable of performing the "full responsibility" for the ROW it is assuming in its statement of willingness. Once the required statement of willingness to assume

[4] MTC notes that the purpose of the "responsibility" language is to ensure that the rail industry is not burdened by liability for accidents on trails and does not require an interim trail manager with state law immunity to assume more liability than exists under state law for its own use of the property. "The fact that a state or local entity may have sovereign immunity does not affect the fact that it has 'full responsibility' for liability arising from the property." MCT Comments at 10. MCT's contention, however, does not explain why the state entity would *need* to qualify its statement of willingness to assume full responsibility for a ROW acquired through sale or donation solely because it may have sovereign immunity under state law.

responsibility is filed by a proposed trail sponsor, the agency leaves it up to the judgment of the carrier whether it is willing to enter into an interim trails agreement with the proposed sponsor. See *Use of Rights-of-Way As Trails*, 1986 WL 68617 **11; *Chesapeake Railroad*, Slip op. at 8. Accordingly, the fact that there are many interim trail use agreements under the Trails Act with state government entities that have some measure of sovereign immunity that submitted unqualified statements of willingness does not indicate that any of these agreements fail to comply with the requirements of the Trails Act nor that existing arrangements would be in any way disenfranchised.

Finally, MCT contends that because an interim trail use agreement is wholly voluntary on behalf of the carrier and the interim trail sponsor, and because the Board's function is only ministerial, if the railroad is itself satisfied that it has sufficient protection from liability for interim trail use from a state or local government entity and is willing to enter into an interim trail use agreement under a qualified statement of willingness, the Board should be satisfied with the arrangement if the carrier is satisfied with the arrangement . MCT Comments at 13. Such contention is also made by MTA and RTC, which urge the Board in their respective comments to expressly recognize the limitations state sovereign immunity laws may impose upon prospective state government trail sponsors under the Trails Act by incorporating the qualifying language *"to the fullest extent allowed under applicable state law"* in statements of willingness submitted by state government entities. MTA Comments at 6; RTC Comments at 2.

The parties' assertions essentially boil down to "a carrier may voluntarily enter into an interim trail use agreement with a prospective state/local government trail sponsor with sovereign immunity even though the 'statement of willingness' requirement of the Trails Act is not met." Such assertions overlook the fact that under the statutory scheme it is one of the

ministerial functions of the Board to ensure that the requirements of the Trails Act *are* met before the parties may enter into an interim trails use agreement and that one of the specific statutory requirements is that an unqualified "statement of willingness" be submitted by a proposed trail sponsor, including a state or local governmental entity. *Cf. Birt* 90 F. 3d at 583-584 (D.C. Cir. 1996). Moreover, even if a qualified "statement of willingness" were to be acceptable to both parties to an interim trails use agreement in certain circumstances, the arrangement does not fully comply with the express requirements of the Trails Act and may raise questions under the statutory scheme from the legal prospective of a potential reversionary property owner who would otherwise be entitled to the property but for the application of the Trails Act requirements.

In the AAR's view, the Trails Act requires a proposed trail sponsor to submit an unqualified statement of willingness to assume full legal, tax and management responsibility for trail use as the Board so found in *Chesapeake Railroad.*[5] Indeed, the arguments raised by MCT, MTA and RTC were essentially rejected by the Board in *Chesapeake Railroad.* See *Chesapeake Railroad* at 7-8 and note 11.

In the NPR, the Board noted the various options available to state and local governmental entities with sovereign immunity to participate in the railbanking program if they choose to do so. The AAR concurs in the Board's assessment. See NPR at 6; see AAR Comments at 10.

2. Notice of Trail Use Agreements

Although MCT and RTC support the NPR's proposed requirement that the Board be

[5] MCT also notes that it is unaware of any complaints from the rail industry that state or local governments with sovereign immunity are operating railbanked trails that are imposing burdens on the railroad industry and that if the agency or railroad has such evidence it should produce it for comment. The AAR has not canvassed the railroad industry for "burden" evidence. The AAR would note that there is always a potential for a liability occurrence under an arrangement for interim trail use and the fact that an issue may not yet have arisen does not mean that it cannot arise in future.

notified when a trail use agreement is reached (as does the AAR); they believe that the notice need not be submitted jointly as the Board proposed. MTC at 5. [6] MTC instead contends that so long as notice is served on the other party to the agreement, either party should be able to file the notice of agreement. *Id.*

The AAR disagrees with the position of MCT and RTC on the joint notice issue. The AAR believes that joint notice of agreement is the clearest form of indication that an interim trail use agreement has indeed been reached between the rail carrier and the proposed trail sponsor and should accordingly be required to remove any uncertainty on this issue. Moreover, in the absence of a joint notice requirement, neither party would have clear responsibility for filing the notice of agreement. The AAR also believes that a joint notice requirement would impose no significant "extra level of coordination" burden on the parties as MCT contends. MCT Comments at 5.

Neither MCT, MTA nor RTC object to the Board's NPR proposal that the notice be filed within 10 days after an interim trails agreement has been reached. MCT (and to a lesser extent RTC), however, take issue with the Board's failure to define the "notion of an agreement" in the NPR and how the definition of agreement would relate to the need for the parties to seek to extend the NITU negotiating period during the parties' deliberations. MCT Comments at 5-6; RTC Comments at 1. The parties' concerns are without merit.

The AAR believes that there is no need for the Board to specifically define what constitutes an agreement in its rules. By requiring the parties to file a joint notice that they have reached an agreement, the parties are free to determine for themselves when an interim trails use agreement has been actually reached to their mutual satisfaction.

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[6] RTC generally concurs in the comments of MCT and provides additional comment on several issues. RTC Comments at 1.

3. Need to Petition the Board to Modify or Vacate a CITU/NITU

MCT does not oppose the Board's proposal for modification of the CITU/NITU when the interim trails use agreement ultimately provides for railbanking of less than the right-of-way included in the original CITU/NITU "so long as the requirement is purely ministerial." MCT Comments at 6. As MCT recognizes, the CITU/NITU is self-executing, and "authorizes railbanking or abandonment, with the ultimate election how much of a line is railbanked or abandoned up to the parties." *Id.* MCT accordingly views the Board's proposal as solely informational in nature ("STB in essence would simply record what the parties have agreed to railbank, if the agency is now planning to maintain information on corridor status"). *Id.* at 7.

The AAR agrees with MCT that any modification to the original CITU/NITU to reflect the scope of the railbanking agreement ultimately reached (i.e., specifying the actual ROW covered by the agreement) would be purely ministerial in nature and would essentially be for informational purposes only. The AAR accordingly reiterates its position (AAR Opening Comments at 15-17) that there is no need for the Board to require a burdensome "petitioning" process to vacate and modify the original CITU/NITU to provide the information sought by the Board and that the submission of the notice of agreement (specifying the actual ROW to be railbanked) is fully sufficient to provide the Board with such information on corridor status.

4. Reactivation of Rail Lines and Compensation Issues.

MCT notes that there is no issue with respect to the Board's proposed clarification that a substitute trail sponsor must affirmatively acknowledge that the continued interim trail use is subject to possible future restoration of the ROW and reactivation of rail service. MCT Comments at 7. MCT, however, seeks to raise a general compensation issue in its comments, noting that "while the agency can authorize reactivation, it cannot require a transfer of the rail

property interest without compensation" and that "[p]resumably such compensation would be arranged voluntarily between the parties by agreement, or by use of state law eminent domain...." *Id.*

The AAR submits that any discussion of compensation issues is beyond the scope of the NPR and that MCT's comments regarding compensation matters require no AAR response. As the Board noted in the NPR, "The Board will not revisit or expand on any of the analysis set forth in [its cited decisions in reactivation cases] at this time. Issues such as who should bear the cost to restore rail service are best addressed as they arise in the context of an individual case." NPR at 7.

MCT also raises an issue with respect to Board reactivation decisions in which the agency "has purported to vacate the NITU, reinstituting the service obligation over the corridor." MCT at 8. MCT notes that "essentially all STB service authorizations are permissive, not mandatory" and that a railroad seeking to reactivate rail service on a railbanked line may never do so, or may do so on a portion less than the entire railbanked line." *Id.* MCT accordingly suggests that "[r]ather than vacate the NITU, the agency should simply authorize reactivation. If service is in fact reactivated (that is, if the reactivating entity in fact acquires the line or a portion thereof), then upon being so informed, STB can vacate the NITU in its entirety ... or issue a modified NITU for the portion of the line over which no service is reactivated." *Id.*

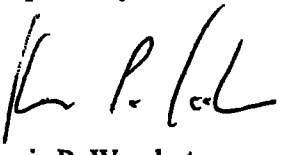
The AAR opposes MCT's proposal. Under the Trails Act, a carrier has an absolute right to reactivate service over a rail-banked line and does not need prior Board authorization to reactivate service. See, e.g., STB Finance Docket No. 35116, *R.J. Corman Railroad Company/Pennsylvania Lines Inc.—Construction and Operation Exemption—In Clearfield County, PA* (served July 27, 2009), Slip op. at 6-7; *Birt,* 90 F. 3d at 583-584 (D.C. Cir. 1996).

Accordingly, the Board's current procedure of vacating the NITU upon a carrier's request to reactivate service over the ROW is the appropriate procedure that the Board should continue to follow. Moreover, the AAR believes that MCT's proposal –either directly or indirectly— also relates to a compensation issue that is beyond the scope of this proceeding (i.e., whether a trail sponsor has a right to demand compensation as a prerequisite to the re-transfer of the ROW to the original abandoning carrier for purpose of reactivation of service). See Docket No. AB-389 (Sub-No. 1X), *Georgia Great Southern Division, South Carolina Central Railroad Co. Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA*, 6 S.T.B. 902, 906-908 (2003).

Conclusion

The Board should adopt the rules proposed in the NPR as modified by the AAR's proposals.

Respectfully Submitted,



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